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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 469

PHILIPPINE AIR LINES, INC.,
Petitioner,

—against—

HOWARD ORLOVE, doing business under the firm name and style of H. ORLOVE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October 23, 1958.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PRELIMINARY STATEMENT

On July 25, 1958, the United States Court of Appeals for the Second Circuit entered a judgment affirming a judgment of the District Court for the Southern District of New York in favor of respondent, H. Orlove Company (hereinafter called "Orlove"), and against petitioner, Philippine Air Lines, Inc. (hereinafter called "Philippine Air Lines"), and a judgment over in favor of Philippine Air Lines against The Flying Tiger Line, Inc. (hereinafter called "Flying Tiger"). On October 8, 1958, Flying Tiger filed a petition for a writ of certiorari (hereinafter called "Flying Tiger petition") to review that portion of the judgment in favor of Philippine Air Lines and against Flying Tiger.*

**The Flying Tiger Line, Inc., Petitioner,* v. *Philippine Air Lines, Inc., Respondent,* October Term, 1958, No. 430.

Philippine Air Lines opposes the granting of the Flying Tiger petition and has simultaneously herewith filed a brief in opposition thereto.

This petition should be considered in conjunction with the Flying Tiger petition and the brief of Flying Tiger in opposition thereto.

PETITION

Petitioner, Philippine Air Lines, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on July 25, 1958, affirming a judgment of the District Court in favor of Respondent, Orlove, and against Philippine Air Lines.

OPINIONS BELOW

The opinion of the Court of Appeals (Chief Judge Clark) affirming the judgment against Philippine Air Lines is reported at 257 F. 2d 384 and is printed as Appendix I to the Flying Tiger petition.

The opinion of the District Court for the Southern District of New York (Judge Walsh) granting judgment in favor of Orlove is not officially reported but is cited in 5 Aviation Cases 17,621, and is printed as Appendix II to the Flying Tiger petition.

JURISDICTION

The judgment of the Court of Appeals was entered on July 25, 1958.

The jurisdiction of this Court is invoked pursuant to the provisions of Section 1254(1) of Title 28, United States Code.

THE QUESTIONS PRESENTED

1. Under the rules of the Philippine Air Lines International Air Cargo Tariff* filed with the Civil Aeronautics Board, pursuant to the Civil Aeronautics Act of 1938 [49 U. S. C. A. § 483(a)], is Philippine Air Lines liable for the loss of Orlove's shipment?

2. Under the rules of the Convention for the Unification of Certain Rules Relating to International Transportation by Air [49 Stats. Part 2, p. 3000 *et seq.* (Warsaw Convention)] is Orlove entitled to recover any amount from Philippine Air Lines and, if so, is the amount thereof limited to 250 francs per kilogram, thereby depriving the Courts below of jurisdiction?

PERTINENT PROVISIONS OF THE WARSAW CONVENTION

"Article 20

"(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

* * *

"Article 22

* * *

"(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supple-

*The pertinent provisions are set forth at pages 15a to 19a of Philippine Air Lines Appendix in the Court of Appeals.

mentary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery."

STATEMENT

This action was brought by Orlove against the two air lines to recover the value of a shipment allegedly lost in transit. Philippine Air Lines asserted a cross-claim against Flying Tiger for any damages recovered from Philippine Air Lines by Orlove. Prior to the trial of the action, Orlove discontinued as against Flying Tiger. Flying Tiger remained in the case, however, for the purpose of the claim over by Philippine Air Lines.

FACTS

Philippine Air Lines, in 1949, was operating an air line for the transportation of cargo on routes between San Francisco, California, and Hong Kong. It did not operate between points within the United States (PAL 4a*). At that time, Flying Tiger was operating an air line for the transportation of cargo only between certain cities of the United States, including New York and San Francisco (FT 85a-86a**).

On June 10, 1949 (Friday), at approximately 5:00 o'clock in the afternoon, Orlove appeared at the office of Mercury General Trucking Company (hereinafter called "Mercury General"), Flying Tiger's agent, at 478 Tenth Avenue, New York City, with a wooden box, which he de-

*These references are to pages in the Philippine Air Lines Appendix in the Court of Appeals.

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livered to the dispatcher and receiving clerk in charge, one Edward Steenbeke (FT 26a, 146a, 153a). Mercury General accepted freight at the Tenth Avenue office as receiving agent for Flying Tiger and transported that freight by truck to Flying Tiger at Newark Airport (FT 148a, 151a, 156a). The box was clearly marked for delivery to D. E. Levy, 10 Ice House Street, Hong Kong (FT 27a, 45a). Steenbeke thereupon asked Orlove for certain information and filled out Airbill Request & Shipping Order No. 210107 (PAL Exh. B; FT 122a), which Orlove read and then signed (FT 45a, 60a, 151a, 152a).

The Airbill Request & Shipping Order describes the shipment as "1 Box" with a weight of 49¾ pounds. The consignor is shown as "H. Orlove Co., 233 W. 26, N. Y. C.", and the consignee as "Phil Air Line San Fran Calif." The document contains a space for a declared value, but no declared value is shown.

At about 7:00 o'clock in the evening of June 10, 1949, the box was then delivered by Mercury General, to Flying Tiger at Newark Airport for delivery to Philippine Air Lines in San Francisco, California (FT 153a).

Flying Tiger admitted the shipment was never delivered to Philippine Air Lines (PAL 4a). The District Court found* that Flying Tiger lost the shipment during the flight from Newark to Burbank and that the loss was due to Flying Tiger's negligence and failure to exercise due care (PAL 30a).

With respect to Philippine Air Lines' role in this matter, prior to the shipment in question Orlove had made five other shipments of gold jewelry to Mr. Levy in Hong Kong via Flying Tiger and Philippine Air Lines (FT 22a, 43a). Subsequent thereto, Orlove made six additional shipments

*The District Court findings were affirmed by the Court of Appeals.

of gold jewelry to Mr. Levy (FT 41a-42a). Orlove knew Philippine Air Lines did not carry cargo from New York to San Francisco and that his shipments were being carried from New York to San Francisco by Flying Tiger (FT 44a). Each such shipment had been delivered to Mercury General, known by Orlove to be the agents and truckers for Flying Tiger (FT 43a). On many of these prior and subsequent shipments, Orlove had declared a value to Mercury General and had received Flying Tiger Airbill Request & Shipping Orders with the declared value filled in (FT 46a).

Orlove had been supplied with blank forms of Philippine Air Lines' Shipper's Letters of Instructions (FT 24a). For each shipment he filled out these forms. Such a document was filled out by Orlove, signed by him and dated June 10, 1949. This document (Orlove Exh. 1; PAL 11a) showed the consignee as D. E. Levy, 10 Ice House Street, Room 11, Hong Kong. The shipment was described as "One (1) Wooden Box Iron-Strapped." The contents were described as "200 Pieces Gold Choker Necklaces (Country of Origin—U. S. A.)." The gross weight of the shipment was shown as 49¾ pounds, net weight 44⅛ pounds. The document showed a declared value for carriage of $24,150, and for customs $29,961.

Orlove testified (FT 26a) he telephoned the Philippine Air Lines office on Friday, June 10, 1949. He said he talked to a Mr. Philiba, the clerk in that office, told Mr. Philiba he had a shipment and requested an air waybill number, which was given to him (079-43973). Following this telephone call Orlove prepared the Shipper's Letter of Instructions (Orlove Exh. 1; PAL 11a) which he had with him when he went to the Mercury General office with the box that day (FT 47a).

After delivering the box to Mercury General without saying anything about a declared value, and signing the

Airbill Request & Shipping Order (PAL Exh. B; FT 122a), which contained no declaraiton of value, Orlove mailed the Shipper's Letter of Instructions (Orlove Exh. 1; PAL 11a) with its declaration of value, together with copies of his commercial invoice (Orlove Exh. 2) and his customs export declaration (Orlove Exh. 3) by registered mail to the Philippine Air Lines office (FT 28a).

At no time did Orlove advise Philippine Air Lines he was about to deliver the package to Mercury General and he did not advise Philippine Air Lines of the delivery after it was made (FT 50a). Orlove testified that he mailed these documents to Philippine Air Lines on Friday, June 10, 1949, within a half hour after he delivered the box and the Shipper's Letter of Instructions (Orlove Exh. 1; PAL 11a) shows on its face that it was not received at the Philippine Air Lines office until Monday, June 13, 1949, which was three days after the delivery of the shipment to Mercury General and two days after its disappearance. This was the first indication Philippine Air Lines had that any shipment had been made. The District Court found that "Philippine Air Lines received its first documents in this case on Monday, June 13th * * *" (PAL 31a).

The Shipper's Letter of Instructions (Orlove Exh. 1; PAL 11a) and the Air Waybill (Orlove Exh. 5; PAL 13a), prepared in reliance thereon, both state they are subject to the terms and conditions stated therein and on the backs thereof. They state that the shipment, if international in character (which fact is conceded herein), shall be subject to the rules relating to liability established by the Warsaw Convention. These documents also provide that the shipper accepts all the terms, conditions and provisions in the Philippine Air Lines Tariff filed with the Civil Aeronautics Board, and agrees that the same shall be binding upon it.

REASONS FOR GRANTING THE WRIT

1. Philippine Air Lines' Tariff Provisions Preclude a Recovery By Orlove.

It is well established that the provisions of a carrier's tariff become part of the contract of carriage. *Herman* v. *Northwest Airlines*, 222 F. 2d 326 (2 Cir., 1955), *cert. den.* 350 U. S. 843 (1955); *Lichten* v. *Eastern Air Lines*, 87 F. Supp. 691 (S. D. N. Y., 1949), *aff'd*, 189 F. 2d 939 (2 Cir., 1951).

The decision of the Court of Appeals refusing to apply the provisions of Philippine Air Lines' Tariff is contrary to the established rules and in conflict with its prior decisions and decisions of this Court.

Pursuant to the provisions of the Civil Aeronautics Act of 1938 [49 U. S. C. A. § 483(a)], Philippine Air Lines on June 10, 1949, had on file with the Civil Aeronautics Board an International Air Cargo Tariff, issued June 19, 1948, setting forth all of its rates, rules and regulations.

The Shipper's Letter of Instructions, completed and signed by Orlove, provided that the transportation was subject to Philippine Air Lines' Tariff provisions and that in arranging for other transportation Philippine Air Lines acted only as Orlove's agent (Orlove Exh. 1; PAL 11a).

Philippine Air Lines' Air Waybill (Orlove Exh. 5; PAL 13a) contained similar provisions.

In *Lichten* v. *Eastern Air Lines*, 87 F. Supp. 691 (S. D. N. Y., 1949), *aff'd*, 189 F. 2d 939 (2 Cir., 1951), plaintiff purchased passage from defendant for herself and her baggage from Miami to Philadelphia. Of the two bags checked with defendant, only one was delivered to plaintiff upon her arrival at Philadelphia. The other was sent forward by error to Newark Airport, where it was allegedly wrongfully delivered to an unknown person without proper identifica-

tion and without the production and surrender of a baggage tag. Plaintiff alleged that the bag was subsequently returned to defendant by an unknown person but that more than $3,000 worth of jewelry was missing.

Defendant moved for summary judgment, relying upon the provisions of its tariff relieving it of liability for loss of jewelry. The District Court held the tariff was binding upon the passenger and granted defendant's motion for summary judgment, saying (87 F. Supp., at pp. 694-5):

> "There is no question that these Rules were within the authority conferred by the Civil Aeronautics Act and that they became a part of the contract between the carrier and the passenger. * * * It is well established that a carrier's tariff on file with the Interstate Commerce Commission has an effect equivalent to law until declared unlawful by that Commission, and that the provisions of those tariffs establish the legal relationships of the parties. * * * This is so, irrespective of the injured party's actual knowledge of the tariff provisions."

The Court of Appeals for the Second Circuit affirmed (189 F. 2d 939).

Rule 16 of Philippine Air Lines' Tariff (PAL 15a) permitted it to deliver the goods to "any other transportation organization for transfer or for delivery" and subsequent to such delivery "the Carrier(s) shall not be under any liability unless and until they again come into the actual physical custody of the Carrier(s) or for any act, default, negligence or omission of any such transportation organization, or its agents, servants, employees or representatives."

Furthermore, Rule 16 provided that, in designating or delivering the goods to any other transportation organization, Philippine Air Lines "shall not be deemed to be acting as, or subject to the responsibilities of, a carrier, but

only as agent for the consignor or consignee and shall be required to exercise only reasonable care in the selection of such other transportation organization. The transfer, custody or delivery of the goods by any such other organization shall be subject to its tariff and rules and regulations and to the provisions of the form of contract if any, of such other organization, whether or not actually issued" (PAL 16a).

Rule 17 of Philippine Air Lines' Tariff provided that it shall have no liability for any loss "not caused by actual negligence of itself" and "not occurring on its own line or in its own service" and shall have no liability for any acts "of any other Carrier or any other transportation organization" (PAL 18a).

The District Court held that Philippine Air Lines' Tariff, as well as the Warsaw Convention, applied to Orlove's shipment (FT 120a, 121a), but failed to apply either Rule 16 or 17. The District Court concerned itself only with the tariff provisions for *limitation* of liability and completely disregarded the provisions for complete exoneration from liability.

Rules 16 and 17 of Philippine Air Lines' Tariff are not concerned with limitation of liability for non-disclosure and should have been applied to relieve Philippine Air Lines of all liability. Irrespective of a declaration of value, Philippine Air Lines is not liable where the goods were not in its "actual physical custody" and the loss did not occur "on its own line or in its own service" or " by actual negligence of itself" (Rule 16). The loss concededly occurred on the Flying Tiger Line while Flying Tiger was in possession of the shipment and as the result of Flying Tiger's negligence and failure to exercise due care.

Applying the rule of the *Lichten* case, *supra*, the provisions of the Shipper's Letter of Instructions and Philippine Air Lines' Tariff, Philippine Air Lines is not liable

to Orlove. The Court of Appeals erred in affirming the District Court's holding refusing to apply these rules and provisions to the case at hand.

2. The Warsaw Convention, a Treaty of the United States, Precludes Any Recovery by Orlove.

It is conceded that the Warsaw Convention applies to the shipment in question. *Ross* v. *Pan American Airways*, 299 N. Y. 88 (1949), *cert. den.*, 349 U. S. 947 (1955); *American Smelting & Refining Company* v. *Philippine Air Lines, Inc.*, 131 N. Y. L. J. 6 (Sup. Ct. N. Y. Co., 1954), *aff'd*, 285 App. Div. 1119 (1st Dep't, 1955), *aff'd*, 1 N. Y. 2d 866 (1956).

Article 20(1) of the Warsaw Convention provides that a carrier shall not be liable if it and its agents have taken "all necessary measures to avoid the damage or * * * it was impossible * * * to take such measures."

It was established at the trial that the lost shipment was never in the possession or under the control of Philippine Air Lines. In fact, it was admitted in the answer of Flying Tiger to Philippine Air Lines' crossclaim that the shipment was received by Flying Tiger for transportation to San Francisco but thereafter was lost and could not be located for delivery to Philippine Air Lines (FT 12a). Despite this admission and the finding that the loss was due to Flying Tiger's negligence and failure to exercise due care (PAL 30a), the Courts below erroneously failed to exonerate Philippine Air Lines.

The District Court gave very little attention to the Warsaw Convention. The Court stated its conclusion at the outset (with which we do not agree) that when Orlove delivered his package to Mercury General, gave certain information to Steenbeke, and signed the Airbill Request & Shipping Order, he did everything that could be ex-

pected of him (PAL 23a-24a). The Court thereupon stated (PAL 24a) that it did not think the Warsaw Convention was intended to apply under such circumstances to *limit* the liability of the defendants.

The District Court's entire consideration of the Warsaw Convention was on the question of *limitation* of liability under Article 22 of the Convention. There is nothing in the opinion with respect to *exculpation* of Philippine Air Lines by virtue of Article 20 of the Convention which applies herein even assuming Orlove fully declared the value of his shipment to all parties concerned. As was said in *Favre v. Belgian State and Sabena*, 1950 U. S. Av. Rep. 392, 394 (Court of Appeals of Brussels 1950):

> "* * * in accordance with articles 18 and 20 of the Warsaw Convention (ratified by the Belgian law of 7th April 1936), an air carrier, who is normally responsible for goods while they are under his effective control, ceases to be responsible if he proves that he has taken all the necessary measures to avoid the damage, or that it was impossible for him to take such measures."

In the *Favre* case, *supra*, the carrier had delivered the package to the customs authorities and then it disappeared. The Court relieved the carrier of liability, stating it was impossible for a carrier to take measures to avoid the loss of goods after they have arrived at their destination and are no longer in the possession of the carrier. Surely it follows that it is impossible for the carrier to take any measures to avoid the loss before the goods come into its possession.

Article 20 of the Warsaw Convention explicitly exonerates Philippine Air Lines, a carrier which never came into possession or control of the shipment and which took all possible measures to avoid the loss.

Philippine Air Lines' freedom from liability herein under Article 20 of the Warsaw Convention is absolute and compels a reversal of the judgments of the District Court and the Court of Appeals.

3. Assuming Liability, Article 22 of the Warsaw Convention Limits Orlove's Recovery To 250 Francs Per Kilogram, Thereby Depriving The District Court and The Court of Appeals of Jurisdiction.

A. Article 22 of the Warsaw Convention

Article 22(2) of the Warsaw Convention provides that "unless the consignor has made, at the time the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum * * *," the carrier's liability shall be limited to 250 francs per kilogram. No declaration of value was made by Orlove at the time of the delivery of the box and assuming the liability of Philippine Air Lines it must be limited as provided in Article 22(2) of the Warsaw Convention. *Kraus* v. *Koninklijke Luchtvaart Maatschappij, N. V.*, 92 N. Y. S. 2d 315 (Sup. Ct. N. Y. Co., 1949), *aff'd*, 278 App. Div. 811 (1st Dep't, 1951).

Concededly, at the time the shipment disappeared (sometime between 11:00 P. M., June 10, 1949, and 3:30 P. M., June 11, 1949), there were no documents of any nature whatsoever in anyone's hands, other than Orlove's, containing a valuation of the contents of the box shipped. Furthermore, Philippine Air Lines had not been advised either before delivery to Mercury General or afterwards that Orlove was about to or had made such delivery. The Shipper's Letter of Instructions described the contents of the box and declared a value, but it admittedly was mailed on June 10, 1949, and was not received by Philippine Air Lines until June 13, 1949 (PAL 31a), three days

after the box was delivered to Flying Tiger and two days after the loss.

On the record below, the liability of Philippine Air Lines, if any, must be limited as provided in Article 22(2) of the Warsaw Convention.

In *Kraus* v. *Koninklijke Luchtvaart Maatschappij, N. V.*, 92 N. Y. S. 2d 315 (Sup. Ct. N. Y. Co., 1949), *aff'd*, 278 App. Div. 811 (1st Dep't, 1951), plaintiff sought to recover $3,650, the agreed value of a rare book shipped via defendant's airline and never received by the consignee. The Warsaw Convention applied, and no special declaration of value had been made at the time of the delivery of the package to the carrier. Plaintiff moved for summary judgment and a reference for assessment of damages. Defendant offered no proof to bring it within the exoneration of liability provisions of Article 20(1) of the Warsaw Convention, but claimed the benefit of limitation of liability under Article 22(2).

The Court held that, since no declaration of value was made at the time of the delivery of the package, plaintiff's recovery was limited to 250 francs per kilogram.

Orlove testified that on June 10, 1949, before taking the package to Mercury General, he telephoned Philippine Air Lines, said he had a shipment, asked for an Air Waybill number and "gave them the information that they required" (FT 25a), including the declared value. Orlove did not advise Philippine Air Lines he was about to deliver the package to Mercury General. Furthermore, after such delivery he did not so advise Philippine Air Lines. These facts do not constitute a "special declaration" of the value "at the time the package was handed over to the carrier."

The District Court also held (D. C. Op. 28; PAL 25a) that where a carrier is entitled to limit liability based upon non-disclosure of value, under the circumstances of this

case, the carrier "may not claim such limitation without making actual inquiry as to value." The "circumstances described in this case," which the District Court then gave to illustrate its conclusion (D. C. Op. 29; PAL 25a, 26a) were (1) the fact that blank forms of Shipper's Letters of Instructions had been given to Orlove and (2) the fact (which Steenbeke denied) that Steenbeke filled out the Airbill Request & Shipping Order and did not ask Orlove as to the value of the shipment.

To place the affirmative burden on the carrier to inquire as to the value of the shipment is unwarranted and contrary to the express provision of the Convention which places the burden upon the consignor to make a special declaration of the value. As far as the circumstances of this case are concerned, the delivery of the forms to Orlove and the filling out of the trucker's receipt by Steenbeke, were both done merely for the convenience of Orlove. Surely, Philippine Air Lines waived no rights by reason of either of these circumstances.

The shipment in question weighed 49¾ pounds, or approximately 22.6 kilograms. At 250 francs per kilogram, Orlove's recovery, if any, must be limited to 5,650 francs, or $383.57.

B. Jurisdiction of the District Court

The jurisdiction of the District Court was based on diversity of citizenship under 28 U. S. C. A. § 1332, which then provided:

> "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:
>
> "(1) Citizens of different States."

In *Harris Trust & Savings Bank* v. *United Air Lines, Inc.*, 1951 U. S. Av. Rep. 33 (Cal. Super. Ct., 1951), the required jurisdictional amount was a sum in excess of $100. Plaintiff sought damages for loss of baggage shipped on defendant's airline. Defendant's tariff limited its liability for loss of baggage to $100 where no excess valuation ticket was purchased. The Court, sustaining a demurrer to the complaint, said:

> "In view of the fact * * * the court has concluded that each fare-paying passenger is limited to a recovery of $100 in the absence of an allegation in the complaint that such passenger declared a greater valuation as provided in the tariffs, the court is without jurisdiction of the action. While the prayers of the complaints are for an amount in excess of that required to confer jurisdiction upon the Superior Court, and normally the court will not look beyond the prayer in determining whether or not jurisdiction exists, it is, none the less, well settled that the amount prayed for does not conclusively determine that the action is for the recovery of an amount within the jurisdiction of the court. In determining this question the court is authorized to look to the allegations of fact, and where the complaint shows that less than the minimum jurisdictional amount is really in controversy, jurisdiction does not exist * * *."

The limitation of Orlove's recovery to $383.57 deprived the District Court of jurisdiction, and the motion to dismiss the complaint on this ground should have been granted.

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that in the event the Flying Tiger petition (No. 430) is granted, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit in favor of respondent and against petitioner.

Respectfully submitted,

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October 23, 1958.